Office-Supreme Court, U.S.
FILED
SEP 6 1962
JOHN F. DAVIS, CLERK

Nos. 187, 188, 189, 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

FRED ISAACS AND HARRY ISAACS, *Petitioners,*

v.

UNITED STATES OF AMERICA

BENSON M. LARRICK, *Petitioner*

v.

UNITED STATES OF AMERICA

EARL A. JEFFORDS, *Petitioner*

v.

UNITED STATES OF AMERICA

FRED A. OSSANNA, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF PETITIONER OSSANNA TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTION

Any summation of the facts of the enormous record below by petitioner and the respondent would naturally have certain differences. That is true in this case. But the differences are so minor to the fundamental issues presented by this that no effort need be made in this brief reply to contradict the government's statement of the facts. Indeed, the Government's statement of the facts, slanted as it naturally is in the Government's behalf, substantiates the existence of those very issues which petitioner Ossanna originally believed were worthy of review by this Court upon a writ of certiorari.

THE KOTTEAKOS DOCTRINE IS PLAINLY APPLICABLE

Petitioner has never contended that the instructions of the trial judge viewed as an abstract proposition with respect to the ruling of this Court in *Kotteakos* v. *United States*, 328 U. S. 750 (1946), were incorrect. But it is hornbook law that it is prejudicial error for a judge to give instructions permitting a finding of guilt unwarranted by the evidence of record. *Bollenbach* v. *United States*, 326 U. S. 607 (1946). And this is what has occurred in this case, for the finding of the jury can rest only on the existence of an over-all conspiracy in which all of the defendant-petitioners took part.

There is simply no evidence to substantiate such a conclusion. The Government's statement of the facts in its Brief in Opposition fails of proof to that effect. Admittedly the evidence of record could support findings of a series of conspiracies in which the insiders—Ossanna, Larrick and Towey—could have been participants. This series of conspiracies is set forth on page 4 of the Government's brief, to wit, (1) the disposal of scrap to American Iron, (2) the payment of "unearned" real estate commissions to Jeffords,

(3) the commissions paid for discounting the Mexican notes, (4) the sale of the "Hopkins Right-of-Way", (5) the sale of surplus lots to Towey, as to which the trial judge declared that Ossanna had no connection. The only connecting link that can be made between these several conspiracies so as to treat them as a single over-all conspiracy, is that they all related to the sale of property made surplus by the Transit Company's determination to convert from street-car to bus operations—surplus property that was of various kinds—scrap, securities and parcels of real estate.

Exactly this same link existed in *Kotteakos* v. *United States, supra*. The only difference is that in *Kotteakos* the insider consisted of one man and not three—an utterly immaterial difference. Brown in *Kotteakos* in substance held himself out as one who could arrange loans on a fictitious basis with the Federal Housing Administration. Had he had a brother or a partner in that enterprise, the conspiracies proved still would have been several and not single. Had one of borrowers learned from another borrower that Brown was available for such an illegal operation, the conspiracies still would have been several and not single. As this Court in *Kotteakos, supra* at p. 755, approvingly quoted the statement of the Court of Appeals, 151 F. 2d at 173: "Thieves who dispose of their loot to a single receiver—a single 'fence'—do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a 'fence' to make them such."

Yet this is the theory of the Government. It admits that the Isaacs were not involved in the real estate sales and that Jeffords was not involved in the sale of scrap. But it argues that "each, to that extent, may have been interested only in his cut of the pie. But all three of them well knew that there would be no pie to cut without corrupt 'insiders' in control of the company." (Gov't Brief, pp. 14-15). In short, each

of the various outsiders may have known that the insiders were a "fence", although no proof of this fact exists, but that knowledge, as this Court has said, is not enough to make them confederates.

The Government tries to apply the principles enunciated in *Blumenthal* v. *United States*, 332 U. S. 539 (1947) to buttress its position, saying (Gov't Brief, p. 15) that "the 'outsiders' were necessarily aware that their share in the fraud depended on the larger plan of the 'insiders' to loot the company's property" and that consequently "their knowing and interested cooperation made them a part of the overall scheme." There is nothing in the record to support this assertion. The success of the alleged fraudulent scheme to acquire the scrap had no dependence on the sale of the Mexican notes or on the sale of the parcels of real estate. All were separate and independent transactions. *Blumenthal* v. *United States*, *supra*, upon which the Government relies, is a wholly different situation. There the evidence specifically established that the "salesmen were aware that their individual sales were part of a larger common enterprise, dependent on the carefully involved arrangements to give the sales the guise of legitimacy, to dispose of a larger store of liquor. . . . Each salesman knew . . . that the elaborate arrangements were made not merely for his sales but also for others. . . ." *Ibid* pp. 555-56, notes 14, 16. Obviously no such similar inference can be derived from the evidence of record in this case. The most favorable inference that can be made is that the outsiders knew that the insiders were operating something in the nature of a "fence", like Brown in *Kotteakos*, but, as this Court has stated, that knowledge, if it existed, is not enough to make them confederates.

In short, *Blumenthal* is not the governing case; *Kotteakos*, which the Government studiously ignores, is.

THE LIABILITY OF THE INSIDERS

Petitioner as distinguished from petitioners Isaacs or Jeffords is admittedly an "insider". As to them, the Government says: "The only basis for their complaint is that each of them was not shown to have directly participated in a particular (and minor) facet of the overall scheme." (Govt's Brief, p. 14) This is not a correct statement of the position of petitioner-Ossanna. His claim has always been that he has been prejudiced, equally with the outsiders, by being charged with an over-all conspiracy as to which there was no proof. Whether or not he and the other insiders could in the Court's opinion be found guilty of a different conspiracy or series of conspiracies is not material. As this Court said in *Kotteakos* v. *United States*, *supra* at pp. 763-764:

> "Thus, it is not the appellate court's function to determine guilt or innocence. *Weiler* v. *United States*, *supra* at 611; *Bollenbach* v. *United States*, 326 US 607, 612, 613. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error."

The application of the principle of the *Kotteakos* case to petitioner Ossanna is clear and simple as was pointed out in his original petition, pp. 12-13. It is this: the vice of a variance between the indictment for a single over-all conspiracy and the proof of several unrelated conspiracies, even though they may have a central hub, rests not in the

fact that certain of the convicted defendants may be innocent of the over-all charge, but that there has been prejudice throughout the trial to all the defendants, including the "insiders". That prejudice affects petitioner Ossanna to the same degree as it affects the so-called "outsider" petitioners.

THE EQUIVOCAL INSTRUCTIONS TO THE JURY

The Government's Brief emphasizes the equivocal character of the trial court's instructions to the jury with respect to the ordinance of the City of Minneapolis relieving the Transit Company for a consideration of its duty to repave streets from which the rails had been removed, thus shifting the cost of repaving from American Iron and Steel Corporation to the Transit Company.

The issue of fraud in connection with this ordinance was submitted to the jury under instructions permitting them to find (a) that the procurement and adoption of the ordinance was a device arranged by Ossanna and Isaacs to free American Iron from the alleged onerous burden of repaving, or (b) that the ordinance was an evidentiary factor that Ossanna and Isaacs at the time of the original contracts entered into a scheme to make the surplus scrap available to American Iron at bargain prices, never intending to carry out the original contracts. The court below found that there was no evidence to support theory (a), nevertheless, mistakenly in petitioner's opinion, concluded that giving the instruction did not constitute prejudicial error.

The Government, however, now (Brief p. 16) contends that the facts justified the instruction as set forth in (a) above despite the holding of the court below to the contrary, namely, that there was no evidence to support fraud in the procurement or adoption of the ordinance. (App. 49) With

the ambiguity of the instructions of the trial court, with a complete variance between the Government and the court below as to what theory the facts of record could support, it is impossible to say that the jury was not confused as to the critical part that the ordinance played in its conclusion that petitioners were guilty. Under such circumstances prejudicial error must be deemed to have been committed. *Bollenbach v. United States, supra.*

CONCLUSION

For the reasons herein stated, it is submitted that this case is deserving of review by this Court and that the petition for certiorari should be granted.

Respectfully submitted,

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